No. 126

In the Supreme Court of the United States

OCTOBER TERM, 1951

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMERICAN NATIONAL INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the Court of Appeals (R. I. 111-115) [1] is reported at 187 F. 2d 307. The findings of

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[1] The printed record before this Court consists of three volumes: volume one, referred to hereinafter as "R. I.," contains the pleadings, Board decision and order and the proceedings in the court below; volume two ("R. II.") contains the portions of the transcript of testimony and exhibits reprinted by the Company as an appendix to its brief in the court below; volume three ("R. III.") contains the material reprinted by the Board as an appendix to its brief in the court below. Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings, succeeding references are to the supporting evidence.

fact, conclusions of law, and order of the Board (R. I. 85-107) are reported at 89 NLRB 185.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1951. A petition for rehearing was denied on April 2, 1951. The petition for writ of certiorari was filed on June 18, 1951, and granted on October 8, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether an employer violates Section 8 (a) (5) and (1) of the Act by refusing to enter into any contract with a union unless the union agrees to include therein a clause waiving its statutory right to bargain about selection, hire, promotion, demotion, discharge, and discipline of employees, determination of work schedules, and other terms or conditions of employment.

STATUTE INVOLVED

The statutory provisions principally involved are Sections 8 (a) (1) and (5), 8 (d), and 9 (a) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 151, *et seq.*). The pertinent provisions are set out in the Appendix, *infra*, pp. 59-60.

STATEMENT

Upon the usual proceedings, under Section 10 of the Act, the Board, on April 5, 1950, issued its decision and order against respondent (R. I. 85-107).

I. The Board's Findings of Fact

Pursuant to a representation proceeding under Section 9 of the Act, the Board, on September 2, 1948, certified as the exclusive bargaining representative of respondent's office employees in an appropriate bargaining unit, Office Employees International Union AFL, Local No. 27, herein called the Union (R. I. 96; 22-23). Thereafter, between November 30, 1948, and the time of the hearing before the Trial Examiner on July 26, 1949, the parties engaged in negotiations with respect to a collective agreement (R. I. 85-86, 96-99; R. III. 23-25). At the first two meetings the Union submitted a proposed contract covering the principal matters generally included in collective agreements (R. I. 97; R. III. 25-26, 36-37, 39-40; R. II. 48-60, 60-63). Thereafter negotiations were recessed to January 10, 1949, to give respondent time to study the Union's proposals (R. I. 97; R. III. 40-41).

At the January 10 meeting, respondent, having "given considerable thought to the character of prerogative that, in our opinion, the Company was entitled to maintain * * * as well as * * * to the character of safeguard which would make the retention of such prerogatives to which we thought

the Company entitled * * * invulnerable to attack" (R. II. 32), proposed that the following "management prerogative clause" be incorporated in the contract (R. I. 97; R. III. 42-43):

> The right to select, hire, to promote, demote, discharge, discipline for cause, to maintain discipline and efficiency of employees, and to determine schedules of work is the sole prerogative of the Company and the Company's decision with respect to such matters shall never be the subject of arbitration.

The Union objected that if it accepted this clause it would be abdicating the bargaining rights secured it by the Board's certification (R. I. 97; R. III. 43-44, R. II. 16). From this time on, throughout the negotiations, however, respondent took the position that it would enter into no contract which did not contain its prerogative clause.

At conferences on January 11 and 12, the Union attempted unsuccessfully to bypass the prerogative clause temporarily in order to secure agreement on other proposed provisions (R. I. 97; R. III. 45-46). The proposed prerogative clause, as the Board found (R. I. 86, 97; R. III. 46-47), "so pervaded the field of bargaining that all paths of discussion appeared to be blocked by it."[2]

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[2] The only agreements reached related to such undisputed matters as a recognition clause, a no-strike clause, and elimination of physical examination of new employees (R. I. 97; R. III. 50).

Respondent's attorney and principal negotiator stated that "if the Union will agree to accept that prerogative clause, I can guarantee you a contract within an hour or two" (R. III. 47). The Union replied that such a contract would be worthless since the clause empowered the Company to change rates of pay unilaterally, to arrange work schedules at any time without regard to shift differentials, and to demote and discipline "for cause" without any definition of that term (*ibid.*). Respondent finally stated that it could not negotiate any further until the Union agreed to the "prerogatives of management," and added that under the Taft-Hartley Act it "did not have to recede from any position," and that therefore the negotiations were "deadlocked." The Union denied that there was a deadlock, and suggested an adjournment (R. I. 97; R. III. 47-49).

The next conference was held on January 18, 1949 (R. I. 97; R. III. 51). Respondent continued to insist on the prerogative clause, suggesting that if it administered the clause unfairly, the Union would have recourse to the Board, (R. I. 97-98; R. III. 51-52).. Respondent expressed its willingness to contract that the terms of the Fair Labor Standards Act and other applicable statutes would govern the rights of employees where pertinent, but said that it would not agree to provisions going beyond such requirements (R. I. 98; R. III. 52). At this meeting re-

spondent submitted a set of counterproposals to the Union (R. I. 98; R. III. 53-58; R. II. 64-79), which provided, in the main, for continuance of the existing wage scale, and leave policy, and restated in greater detail the management prerogatives insisted upon by the Company.[2a] The new prerogative clause read as follows (R. I. 98; R. II. 66-67):

> Nothing in this agreement shall be deemed to limit or restrict the Company in any way in the exercise of the customary functions of management, including the right to make such rules not inconsistent with the terms of this agreement relating to its operation as it shall deem advisable, and the right to hire, suspend, discharge or otherwise discipline an employee for violation of such rules or for other proper cause.
>
> The right to select and hire, to promote to a better position, to discharge, demote, or dis-

[2a] Respondent in its counterproposal (R. II. 69) rejected the Union's proposal that "The established work week shall consist of five (5) consecutive days [eight hours in length], beginning at 8:00 a.m. Monday" (R. II. 53), on the ground that the Company "wanted to maintain flexibility and wanted the right to change those hours any time they saw fit" (R. III. 115). Similarly, because respondent desired to reserve "the right to put other employees of its own choosing on such work if, in the opinion of the Company, such action becomes necessary" (R. II. 69), respondent rejected the Union's proposal that overtime work be distributed equally to employees in the office involved (R. II. 54). Respondent also rejected the Union's proposals dealing with leaves of absences and layoffs (R. II. 52, 55, 68, 71), and the Union's request that it be furnished the results of tests given by respondent to determine whether employees were qualified for promotion on the ground that the administration of such tests was "a Company prerogative" (R. I. 101; R. III. 66-67).

> cipline for cause, and to maintain discipline and efficiency of employees and to determine the schedules of work is recognized by both union and company as the proper responsibility and prerogative of management to be held and exercised by the company, and while it is agreed that an employee feeling himself to have been aggrieved by any decision of the company in respect to such matters, or the union in his behalf, shall have the right to have such decision reviewed by top management officials of the company under the grievance machinery hereinafter set forth, it is further agreed that the final decision of the company made by such top management officials shall not be further reviewable by arbitration.

By January 19, the Union reluctantly agreed to accept the first paragraph of the clause, but continued to assert that inclusion of the second paragraph would make any agreement meaningless and subvert the Union's status as bargaining representative (R. I. 98-99; R. III. 58-62). Respondent stated that it had a right to insist on the inclusion in a contract of any clause it desired, and that unless the Union agreed to the amended "prerogative clause" there would be no contract (R. III. 59-61). Respondent added that this clause was the "meat of the contract" and that if the Union accepted it a contract would be signed in "short order" (R. I. 98; R. III. 60-61).

On January 28, 1949, the Union filed a charge with the Board alleging, *inter alia,* that the Company had refused to bargain in good faith, in violation of Section 8 (a) (5) of the Act (R. I. 23-25, R. III. 62). Nevertheless, negotiations were resumed on February 7, 1949, and continued until the date of the Board hearing on July 26, 1949 (R. III. 24, 104). In February, 1949, the Union proposed that working rules be "mutually agreed to" by the parties as "a part of this contract" (R. II. 102). Respondent refused, insisting that the Union accept the prerogative clause without modification (R. II. 3-4). At a meeting held on March 11, 1949, the Union requested a copy of the Company's rules and regulations in order to determine more accurately the scope of unilateral action reserved to petitioner by the prerogative clause (R. III. 94-95, 140). These rules gave the Company complete power "in its discretion" to "establish new rules and practices," and "amend" or "cancel" existing rules and practices (R. III. 141-154). The regulations also reserved to the Company the "exclusive right" to take "whatever action it deems advisable," including discharge, for violations of the rules (R. III. 154). In addition, under its regulations, the Company possessed the sole right to determine whom to "promote or demote," and the "exclusive right to transfer, temporarily or permanently, to any Department, em-

ployees of other Departments regardless of seniority" (R. III. 142-143). The Company also retained the "exclusive right to approve or disapprove requests for leave of absence," and to distribute overtime work to "employees of its own choosing . . . if in the opinion of the Company, such action becomes necessary" (R. III. 144, 149). The Union representatives declared that petitioner's insistence upon retaining the right "to establish the rules, and without any prior notice * * * change [them] * * * without consulting the Union * * * was not bargaining with us" (R. III. 96).

At a meeting held on May 19, 1949, the Union submitted as a tentative offer a complete set of new counterproposals to the Company, accepting respondent's existing wage scale, and vacation and sick leave schedule (R. I. 99; R. III. 83-84). Respondent's prerogative clause was agreed to with a proviso that respondent exercise its prerogative in a "fair and just manner" (R. I. 99; R. III. 97-98; R. II. 108). Respondent objected to the compromise on the ground that by its terms, decisions taken by the Company pursuant to the prerogative clause would still ultimately be subjected to arbitration (R. I. 99; R. III. 97-98). Respondent repeated its assertion that it would never condition its prerogative on arbitration, and that no law required it to do so (R. I. 99; R. III. 97-98).

At various times during the negotiations between November, 1948, and May, 1949, respondent, without consulting or notifying the Union, established new night shifts in several departments of the office. An hourly wage of one dollar was instituted for workers employed on the new shifts, in contrast to the $85 per month starting salary for day shift workers (R. I. 85-86; R. III. 119-120, 135-137). When the Union objected to respondent's unilateral action in this regard, respondent stated that its management prerogative permitted the taking of such action without prior consultation with the Union (R. III. 124-125). Similarly, while the negotiations were still in progress, respondent, without consulting the Union, instituted a new system of staggered lunch hours[3] (R. I. 85-86; R. III. 128-131).

After issuance of the Trial Examiner's intermediate report and before the Board's decision, respondent and the Union, on January 13, 1950, executed a contract[4] containing, among other things, a prerogative clause not materially differ-

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[3] Before changing the lunch hour Dribell, respondent's representative, did ask Stafford, the Union's principal negotiator, if he personally had any objection to the proposed change. Stafford replied that he did not personally care, but that the proposal should be first discussed with the official Union negotiating committee. This respondent failed to do (R. III. 128-131).

[4] Before the Board respondent moved to dismiss the refusal-to-bargain charges on the ground that this agreement rendered the charges moot (R. I. 87; 63-67). The Board denied the motion on the ground (R. I. 87) that, even assuming that respondent had finally abandoned its unlawful conduct, "the

ent from that insisted upon by respondent throughout the negotiations discussed above (R. I. 87; 68-82).[5]

II. The Board's Conclusions and Order

The Board found (R. I. 85) that, by the prerogative clause, respondent "sought to reserve to itself the exclusive right to determine unilaterally such terms and conditions of employment as working rules, work schedules, the establishment of extra shifts, lay-off policy, lunch periods, the granting of leave of absence, and the distribution of overtime." The Board concluded (R. I. 86) that, since

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discontinuance of unfair labor practices does not render moot charges based thereon." *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563, 567; *National Labor Relations Board* v. *Pool Manufacturing Co.*, 339 U. S. 577, 581-582. The Board found further (R. I. 87-88) that effectuation of the policies of the Act required that respondent be directed to cease and desist from engaging in the conduct which the Board found to be violative of the Act.

[5] The prerogative clause in the executed contract reads as follows (R. I. 69):

> Functions and Prerogatives of Management
>
> Nothing in this agreement shall be deemed to limit or restrict the Company in any way in the exercise of the customary functions of management, including the right to make such rules not inconsistent with the terms of this agreement relating to its operation as it shall deem advisable, and the right to hire, suspend, discharge, or otherwise discipline an employee for violation of such rules or for other proper and just cause.
>
> The right to select and hire, to discharge, or discipline for cause, and to maintain discipline and efficiency of employees, and to determine the schedules of work is recognized by both Union and Company as the proper responsibility and prerogative of management, to be held and exercised by the Company in a fair and just manner, and while it is agreed that an employee, feeling himself

the subjects covered by the prerogative clause were "terms and conditions of employment," they were subjects of compulsory bargaining under the Act and, accordingly, that respondent's "demand for the prerogative clause as a condition to making a contract . . . [was] in derogation of the Union's bargaining rights secured to it by Section 9 (a) as the exclusive representative of the Respondent's employees and therefore constituted . . . per se [a] violation . . . of Section 8 (a) (5) and (1)" of the Act, quite apart from any question of respondent's good faith. The Board found also (R. I. 85-86) that respondent's action in establishing new work shifts and changing the employees' lunch period, while negotiations were in progress without consulting or notifying the Union, was in violation of Section 8 (a) (5) and (1) of the Act. In addition, the Board found (R. I. 86-87) that respondent's whole course of dealing with the Union, including its refusal to enter into any contract unless the Union agreed to the restrictive prerogative clause, constituted an unlawful refusal to bargain in good faith.

To remedy the violation of the Act manifested by respondent's refusal to execute any contract

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to have been aggrieved by any decision of the Company in respect to such matters or the Union in his behalf, shall have the right to have such decision reviewed by top management officials of the Company under the grievance machinery hereinafter set forth, it is further agreed that the final decision of the Company made by such top management officials shall not be further reviewable by arbitration.

which did not contain the restrictive prerogative clause, the Board's order (Par. 1 (a), R. I. 88) requires respondent to cease and desist from refusing to bargain collectively with the Union "by insisting as a condition of agreement, that the Union agree to a provision whereby the Respondent reserves to itself the right to take unilateral action with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment."

III. The Decision Below

The court below, while sustaining the Board's finding that respondent's unilateral action with respect to the work shifts and lunch period violated Section 8 (a) (5) of the Act (R. I. 86, 114), held (R. I. 113-114), that the Board "was wrong in its . . . conclusion that the Respondent, by insisting on the so-called prerogative clause as a condition of agreement, failed to perform its statutory obligation to bargain," and refused to enforce paragraph 1 (a) of the Board's order (R. I. 88, 115) which required respondent to cease and desist from such conduct.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that under Section 8 (a) (5) and (1) of the Act an employer may refuse to enter into any contract with a union unless the union agrees to include therein a clause waiving its

statutory right to bargain about certain terms or conditions of employment.

2. In not enforcing paragraph 1 (a) of the Board's order.

SUMMARY OF ARGUMENT

I

A. Section 8(a)(5) of the Act requires the employer, upon request, to bargain collectively with the representative of his employees concerning the subjects set out in Sections 9(a) and 8(d), namely, "rates of pay, wages, hours of employment, or other conditions of employment." The courts have uniformly recognized that the right of the employees and the obligation of the employer to bargain collectively extends to each and every matter which falls within the quoted definition, and that an employer therefore violates the Act when he refuses to bargain about any one such matter, even though he is willing to bargain about all other subjects.

The subjects on which respondent in this case refused to bargain—on the ground that their unilateral determination was the "prerogative" of management—included work schedules and working rules, and the promotion, demotion, and discharge of employees. Each of these subjects, particularly "problems of work scheduling and shift assignment" fall within the category of "terms and conditions of employment" (*Electric Railway*

& Motor Coach Employees, etc. v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 399), and are therefore subjects of compulsory bargaining under the Act.

B. Throughout the negotiations respondent made it clear that under no circumstances would it enter into an agreement with the Union concerning those subjects which respondent considered "prerogatives of management." Respondent's insistence that the Union agree—as the price of obtaining a contract on other subjects—that respondent was under no obligation to bargain about the subjects enumerated in the prerogative clause, was designed to and did "foreclose in advance any possibility" (*National Labor Relations Board* v. *Westinghouse Air Brake Co.*, 120 F. 2d 1004, 1006 (C. A. 3)), of fixing shift schedules, working rules, lunch periods, *etc.*, through collective bargaining. By this repudiation of its obligation to bargain collectively about shift schedules and other matters comprehended by the prerogative clause, respondent violated Section 8 (a) (1) and (5) of the Act.

II

A. Respondent also repudiated its obligation to bargain collectively concerning subjects not comprehended by the prerogative clause, such as regular rates of pay, to which the collective bargaining obligation admittedly applies, by conditioning the

execution of any contract dealing with those subjects upon the union's acceptance of the "prerogative" clause. Since the duty to bargain collectively includes the obligation to execute a contract covering substantive terms and conditions which have been agreed upon, an employer can no more lawfully condition the execution of a contract upon the union's submission to an extra-statutory condition like the prerogative clause than he can condition the institution or continuation of negotiations upon it.

With the single exception of the court below in the instant case, the Board and every court which has considered the problem have held that an employer may not lawfully demand, as a condition precedent to performance of his own statutory duty, that the union perform an act which the statute does not require, or yield a right which the statute bestows. This Court has held that even the states may not impose conditions upon the exercise of federally protected employee bargaining rights (*Hill* v. *Florida*, 325 U.S. 538, 542), or reserve to unilateral employer determination issues which the National Act declares to be appropriate for collective bargaining (*Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 398-399). *A fortiori*, an employer may not insist, as a condition precedent to bargaining, that a union forego the exercise of a portion of its statutory rights, or agree to

exempt from the area of collective bargaining subjects which the statute places within that area.

Since the union's right to bargain about shift schedules and other matters covered by the prerogative clause is not itself a "term or condition of employment" but a privilege conferred upon employees by the statute, respondent was not entitled to require the union to "bargain" about its exercise. Certainly, respondent was not entitled to demand, as it did, that the union take less than a full measure of the rights which Congress gave it, or no rights at all. The fact that respondent presented its demand that the union waive a portion of its bargaining rights in the form of a contract clause did not transform the illegality of respondent's insistence upon that waiver into a lawful "bargaining" position. Rather, it emphasized respondent's insistence upon treating "a matter guaranteed the employees as of right," as, at best, "a bargaining matter" (*McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 751 (C.A. 7)).

B. The proviso to Section 8(d) of the amended Act, which provides that performance of the obligation to bargain collectively in good faith shall not be deemed to require either party "to agree to a proposal" or to make "a concession," upon which the court below relied, was clearly not intended to nullify the bargaining obligation itself by leaving compliance with its substantive requirements optional with either party. The proviso

merely restates the rule that the Act does not compel the parties to agree on any particular substantive terms and conditions of employment, and guards against the possibility that mere failure to agree may be regarded as an indication of "bad faith." The Act does, however, compel bargaining. To hold that a refusal "to agree" *to bargain* is immunized by the proviso would mean that Congress with one hand imposed the duty to bargain on request but with the other provided that denial of the request should eliminate the duty.

C. The fact that the union could voluntarily have waived its right to bargain about shift schedules and other matters covered by the prerogative clause, and that such a voluntary waiver would have been recognized as valid, does not excuse respondent's resort to illegal means to secure the waiver. Unless a premium is to be placed upon the commission of unfair labor practices, a "waiver" which results from an employer's refusal to recognize the union's right to bargain about the particular issues in dispute, or his refusal to bargain on other issues in the absence of a waiver, cannot be deemed either voluntary or valid. While an employer may lawfully propose that the union waive a portion of its bargaining rights, and offer economic concessions that he is free under the Act to withhold as an inducement to obtain the union's assent, he may not lawfully even compel discussion, much less compel assent

to such a proposal, either by refusing to recognize the union's right to bargain about the issue in dispute, or by conditioning the continuation of negotiations or the execution of a contract upon it.

ARGUMENT

Introduction

The crux of this case is respondent's refusal to recognize that among the subjects covered by the clause here in issue are matters to which the statutory collective bargaining obligation applies. Throughout the negotiations respondent took the position that those subjects were matters of "management prerogative;" that it had a right to dispose of them unilaterally; and that it would under no circumstances enter into any substantive agreement with the Union about them. Respondent avowedly predicated its action in instituting new shift schedules and a system of staggered lunch hours on the premise that such matters were the prerogative of management (*supra*, pp. 9-10), and the contract clause which it drafted explicitly set forth respondent's view that "The right [*inter alia*] to determine the schedules of work is * * * the proper responsibility and prerogative of management to be held and exercised by the Company * * * " (*supra*, p. 6).

Not only did respondent cling tenaciously to this restricted and, as we shall show, *infra*, pp. 22-26, erroneous view of its collective bargaining obligation, it made the Union's acceptance of this view

the indispensable condition for the execution of any contract at all. Time and again, as the facts set forth in the Statement, *supra*, pp. 4-8, show, respondent insisted that it would execute no contract unless the Union agreed to the "prerogatives of management" as embodied in the "prerogative" clause.[6] As the Board observed (R. I. 86), "Respondent's concepts concerning its management prerogatives so pervaded the negotiations that every effort by the Union to bypass this issue and proceed with other matters was met with frustration." On the other hand, only respondent's insistence that the Union acquiesce in its concept of "management prerogatives" stood in the path of execution of a contract, as clearly appears from the frank statement of respondent's attorney during the negotiations that "if the Union will agree to accept that prerogative clause, I can guarantee you a contract within an hour or two" (R. III. 47).

In sum, respondent repudiated collective bargaining entirely with respect to those matters which it deemed to lie within its "management prerogative" and refused to perform its obligation to bargain on other matters, which admittedly lay within the area of mandatory collective bargaining, unless the Union acquiesced in that repudiation.

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[6] Respondent defended its adamance on the ground that under the Taft-Hartley Act it "did not have to recede from any position" and that, therefore, unless the Union acquiesced in the condition demanded by the Company, the negotiations were "deadlocked" (R. I. 97; R. III. 47-49).

The court below apparently concurred in the Board's finding, *supra*, pp. 11-12, that shift schedules and other matters covered by respondent's "prerogative" clause are comprehended by the statutory phrase "rates of pay, wages, hours of employment, or other conditions of employment" (Section 9 (a), cf. Section 8 (d)); that the collective bargaining obligation imposed by the Act extends to those matters; and that the fundamental position upon which respondent predicated its entire course of conduct was therefore erroneous. The court nevertheless held (R. I. 113-114), that the employer "had a right" to insist that the Union concur in its erroneous view and to make its concurrence therein "a condition of agreement." Accordingly, the court treated the Company's "steadfastness" in insisting upon the prerogative clause as the mere equivalent of the Union's vigorous opposition to it (R. I. 114).

This decision, we submit, condones adamant refusal to bargain about *some* "terms and conditions of employment" as constituting fulfillment of the employer's duty to bargain about *all* terms and conditions of employment. It permits employers to fragmentize the bargaining rights conferred upon employees by the Act by making their enjoyment of some rights contingent upon their abandonment of others. To approve this coercive technique is to rob the collective bargaining obligation of its full content, and to impair its effectiveness as an instrumentality of industrial peace. Unless the Act is to

be construed as self-defeating, it cannot be that reservation to the employer of a right to "bargain" and to refuse concessions (Section 8 (d)) sanctions this device for easy invasion of employee rights and evasion of the employer's corresponding obligations.

I. Respondent, in Violation of Section 8 (a) (5) and (1) of the Act, Refused to Bargain Collectively Concerning Shift Schedules and Other Matters Comprehended by the Prerogative Clause

A. *The statutory obligation to bargain collectively extends to shift schedules, working rules, and other "terms and conditions of employment" which respondent claimed the right to determine unilaterally*

The subject matter of the right to bargain collectively conferred upon employees by Section 7, and of the correlative obligation imposed upon employers by Section 8 (a) (5), is defined in Sections 9 (a) and 8 (d) of the Act. Section 9 (a) provides that the representatives chosen by a majority of the employees in an appropriate bargaining unit "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to *rates of pay, wages, hours of employment, or other conditions of employment*" (Italics added). This definition of the content of collective bargaining is specifically incorporated in Section 8 (a) (5), which provides that it shall be an unfair labor practice for an employer

"to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9 (a)*." (Italics added). In addition, Section 8 (d), which was added to the Act by the 1947 amendments, defines the duty to bargain collectively to mean

> . . . the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith *with respect to wages, hours, and other terms and conditions of employment* * * * [Italics added.]

Recognizing that both the right and the obligation to bargain collectively extend to every matter which falls within the italicized definitions, the courts have uniformly held, both before and after enactment of the amended Act, that an employer who refuses to bargain collectively on any one subject within the defined category thereby violates the Act, even though he is entirely willing to bargain on all other subjects.[7]

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[7] *E.g., Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247, 250-251 (C. A. 7), certiorari denied, 336 U. S. 960 (employee pension and retirement plan); *W. W. Cross & Co.* v. *National Labor Relations Board*, 174 F. 2d 875, 877-878 (C. A. 1) (employee group health insurance plan); *National Labor Relations Board* v. *J. H. Allison & Co.*, 165 F. 2d 766, 768 (C. A. 6), certiorari denied, 335 U. S. 814; and *National Labor Relations Board* v. *Berkley Machine Works & Foundry Co., Inc.*, 189 F. 2d 904, 906, 907-908 (C. A. 4) (individual merit wage increases); *Aluminum Ore Co.* v. *National Labor Relations Board*, 131 F. 2d 485, 486-487 (C. A. 7) (wages). Although Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389 (Jan., 1950), dispute that the

The subjects which respondent claimed the right to determine unilaterally, and therefore to refuse to fix by agreement with the Union, indisputably fall within the statutory definitions, as the Board found (R. I. 86). Those subjects, as defined in the amended "prerogative" clause, included *supra*, pp. 6-7, the establishment of work schedules and working rules, and the promotion, demotion and discharge of employees, each of which pertains to "terms" or "conditions" of employment. In *Electric Railway & Motor Coach Employees, etc.* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 399, this Court, citing the Board's decision in the instant case, held that "problems of work scheduling and shift assignment" are matters on which employers are required by the National Act to bargain collectively. And the court below, in upholding the Board's finding that respondent violated Section 8 (a) (5) of the Act by unilaterally establishing new work shifts and pertinent wage rates without consulting the Union (R. I. 114), apparently recognized that the establishment of new

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italicized phrases in Sections 9 (a) and 8 (d) define the subjects of collective bargaining (*id.*, pp. 393-397), they concede that "it is probably too late in the day to challenge successfully the National Labor Relations Board's present practice of defining the scope of collective bargaining." We submit that the unanimous view of the Board and the courts that the function of the italicized phrases is to define the subjects of collective bargaining is not only correct but that it is the only view which gives meaning to their inclusion in the statute. The fallacies of the Cox-Dunlop position are discussed in Findling and Colby, *Regulation of Collective Bargaining by the National Labor Relations Board—Another View*, 51 Col. L. Rev. 170 (Feb. 1951).

shift schedules is a subject on which an employer may not lawfully refuse to bargain.[8] Indeed, in so far as respondent construed its "prerogative" as authorizing unilateral establishment of wage rates for new work shifts,[9] it invaded the area of "rates of pay" and "wages" which the statute explicitly places within the compulsory bargaining category. Section 9 (a) of the Act; *Inland Steel Co.* v. *National Labor Relations Board,* 170 F. 2d 247, 250-253 (C. A. 7), certiorari denied, 336 U. S. 960; *National Labor Relations Board* v. *J. H. Allison & Co.,* 165 F. 2d 766 (C. A. 6), certiorari denied, 335 U. S. 814; *National Labor Relations Board* v. *Boss Mfg. Co.,* 118 F. 2d 187, 188-189 (C. A. 7).

In addition, the courts have uniformly held that the category "terms and conditions of employment," comprehends the establishment of working rules, and the promotion, demotion and discharge of employees. *National Licorice Company* v. *National Labor Relations Board,* 309 U. S. 350, 360; *Inland Steel Co.* v. *National Labor Relations Board,* 170 F. 2d 247, 252 (C. A. 7), certiorari denied, 336 U. S. 960; *National Labor Relations Board* v. *Bachelder,* 120 F. 2d 574, 577 (C. A. 7); *National Labor Relations Board* v. *Westing-*

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[8] See also *Wilson & Co.* v. *National Labor Relations Board,* 115 F. 2d 759, 763 (C. A. 8).

[9] Although respondent, during the course of negotiations, professed to be willing to bargain about the wage rates applicable to unilaterally established work shifts (R. III. 124-125), in practice it set new and higher wage rates for these shifts without consulting the Union (R. I. 85; R. III. 119-121, 135-137).

house Air Brake Co., 120 F. 2d 1004, 1006 (C. A. 3). Cf. *National Labor Relations Board* v. *J. H. Allison & Co.*, 165 F. 2d 766 (C. A. 6), certiorari denied, 335 U. S. 814; *Standard Generator Service Company* v. *National Labor Relations Board*, 186 F. 2d 606, 607-608 (C. A. 8).

Thus, if, as we shall show, respondent "refused to bargain collectively" with respect to work schedules, working rules, and the promotion, demotion and discharge of employees, its conduct in this respect *ipso facto* violated Section 8 (a) (5) and (1) of the Act.

B. *Respondent refused to bargain collectively concerning the subjects it considered "management prerogatives"*

Actuated by the conviction that the law reserved to management the right to deal unilaterally with the subjects comprehended by the "prerogative" clause, respondent's "mind," throughout the negotiations, remained "hermetically sealed against even the thought"[10] of bargaining with the Union about them (R. I. 86-87). It refused flatly to fix shift schedules, lunch periods, working rules, *etc.*, by agreement with the Union (*supra*, pp. 7-8), because it insisted upon retaining a free hand to change those terms and conditions of employment unilaterally at any time."[11] On these subjects the

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[10] *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F. 2d 713, 723 (C. A. 3).

[11] It is universally recognized that the duty to bargain

only thing respondent offered the Union was an opportunity to agree that it had no right to bargain, and that respondent had no obligation to bargain. This kind of an "offer" to bargain is, in reality, no offer at all. *National Labor Relations Board* v. *Berkley Machine Works & Foundry Co., Inc.*, 189 F. 2d 904, 907 (C.A. 4).

Indeed, respondent's insistence on the "prerogative" clause was admittedly calculated to, and did, render "invulnerable to attack" respondent's position that under no circumstances would it contract with the Union about the "prerogative" clause subjects (R. II. 32). If the Union had accepted the clause there would have been no bargaining on the subjects in question, because the contract itself would have foreclosed it. On the other hand, if the Union rejected the clause, there would certainly have been no bargaining on these subjects because, under respondent's pronouncement that there would in that event be no contract, further negotiations on any subject would have been futile. In short, no matter what position the Union took, respondent would not bargain about the prerogative clause subjects—subjects

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requires the employer, upon request, to offer to fix terms and conditions of employment for a reasonable period at some level, that presently existing, at least. An employer's refusal to do so—because he desires to retain a free hand to change such terms and conditions unilaterally at any time—is, therefore clearly in violation of the duty to bargain. *National Labor Relations Board* v. *Express Publishing Co.*, 111 F. 2d 588, 589 (C. A. 5), reviewed only as to scope of order, 312 U. S. 426; *Globe Cotton Mills* v. *National Labor Relations Board*, 103 F. 2d 91, 94 (C. A. 5); *National*

concerning which it was under a statutory duty to bargain.

Respondent's insistence upon reserving to itself the right to act unilaterally with unfettered discretion in relation to the prerogative clause subjects was not qualified by its offer, contained in the proposed clause, to permit any employee aggrieved by management's unilateral action in this area to obtain review thereof through the grievance procedure provided for in the proposed contract (R. I. 97-98; R. II. 66-67). Since the clause itself precluded establishment of mutually agreed upon standards to govern the exercise of management's discretion, and since it also provided that "the decision of the company" on grievances "shall not be further reviewable by arbitration," it is clear that the offer accorded to the Union nothing more than an ineffectual opportunity to protest management's unilateral decision after the event. The incompatibility of such a scheme with the collective bargaining process envisioned by the Act was demon-

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Labor Relations Board v. *Knoxville Publishing Co.*, 124 F. 2d 875, 882-883 (C. A. 6); *National Labor Relations Board* v. *Swift & Co.*, 127 F. 2d 30, 31 (C. A. 6); *Singer Mfg. Co.* v. *National Labor Relations Board*, 119 F. 2d 131, 136 (C. A. 7), certiorari denied, 313 U. S. 595, rehearing denied, 314 U. S. 705; *National Labor Relations Board* v. *Montgomery Ward & Co.*, 133 F. 2d 676, 687 (C. A. 9). This rule was retained in the amended Act—Congress rejecting an amendment which would have relieved an employer of the duty to make a counterproposal. H.R. 3020, as passed, 80th Cong., 1st Sess., p. 9, 1 Leg. Hist. 166; S. Report No. 105 on S. 1126, p. 24, 1 Leg. Hist. 430.

strated in *Aluminum Ore Co.* v. *National Labor Relations Board*, 131 F. 2d 485, 486-487 (C. A. 7). In that case, the employer, after extensive good faith bargaining with respect to most of the usual matters with which a collective agreement is concerned, took the position that "it would determine for itself what the wages and rates of pay should be." The employer then announced certain wage increases and stated that "these would stand until and unless there should be objection," in which event the employer "would permit any aggrieved person to present his complaint either personally or through the union" (131 F. 2d, at pp. 486-487). The court held (*id.*, at p. 487) that the employer's insistence "upon following [a] plan . . . of not bargaining but of fixing increases ex parte, leaving to hearings of future grievances, determination of whether any adjustment was justified . . . was not the collective bargaining required by the act [but was a procedure] upon the part of the employer effectuating removal of bargaining concerning the exact subject matter at issue. By the employer's act, the union was thereafter excluded from bargaining in determining what the increases should be." So here, respondent's prerogative clause effectuated a "removal of bargaining concerning" the subjects covered by the clause, and the Union "was thereafter excluded from bargaining" about those subjects. See also, *National Labor Relations Board* v. *J. H. Allison & Co.*, 165 F. 2d

766, 768 (C. A. 6), certiorari denied, 335 U. S. 814; *National Labor Relations Board* v. *Boss Mfg Co.*, 118 F. 2d 187, 189 (C. A. 7).

Having "foreclosed in advance any possibility of agreement"[12] by refusing out of hand the Union's requests to fix shift schedules, working rules, lunch periods, etc., by mutual agreement (R. II. 3-4, 53, 101-102; R. III, 47, 89-90, 96, 114-115), respondent clearly repudiated its statutory obligation to bargain collectively about those subjects. *Westinghouse* case, *supra*; *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. 2d 681, 688 (C. A. 1); *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 37 (C. A. 3); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. 2d 632, 637-638 (C. A. 4); *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F. 2d 713, 723 (C. A. 3).[13]

With the collapse of respondent's fundamental contention that the subjects in issue were "management prerogatives" the sole justification for respondent's repudiation of its bargaining obligation disappears. For it is beyond ques-

[12] *National Labor Relations Board* v. *Westinghouse Air Brake Co.*, 120 F. 2d 1004, 1006 (C. A. 3).

[13] The Union's repeated proposals that the issues which respondent insisted upon reserving for unilateral determination be fixed by mutual agreement in the contract, and its specific proposals of substantive terms of agreement with respect to shift schedules and lunch hours, for example, *supra*, pp. 7-8, refute respondent's suggestion that the Union's real objection was to respondent's refusal to agree to arbitration.

tion that an employer's refusal to bargain on a subject to which the collective bargaining obligation applies is not excused by his erroneous though sincere belief that the Act does not apply.[14] Respondent's position, in essence, was precisely the same as that of the employer in *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (C. A. 7), certiorari denied, 336 U. S. 960, who refused to bargain about employee pension and retirement matters because he did not believe that they were subjects of compulsory bargaining under the Act. In that case once the court concluded, as had the Board, that the employer was mistaken in believing that pension and retirement matters were outside the area of "wages . . . or other conditions of employment" (Section 9 (a)), it followed, as both the Board and the court held, that the employer's refusal to bargain about those subjects violated Section 8 (a) (5) of the Act (170 F. 2d, at pp. 249-255).

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[14] *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332; *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678; *W. W. Cross & Co., Inc.* v. *National Labor Relations Board*, 174 F. 2d 875 (C. A. 1); *National Labor Relations Board* v. *General Motors Corporation*, 179 F. 2d 221 (C. A. 2); *National Labor Relations Board* v. *J. H. Allison & Co.*, 165 F. 2d 766 (C. A. 6), certiorari denied, 335 U. S. 814; *Aluminum Ore Co.* v. *National Labor Relations Board*, 131 F. 2d 485, 486-487 (C. A. 7); *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. 2d 474, 478-479 (C. A. 5). Cf. *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 751 (C. A. 7), certiorari denied, 313 U. S. 565.

II. Respondent, in Violation of Section 8 (a) (5) and (1) of the Act, Refused to Bargain Collectively Concerning Matters to Which the Collective Bargaining Obligation Admittedly Applied

A. By refusing to execute any contract unless the restrictive prerogative clause was included therein respondent imposed an unlawful qualification upon its offer to bargain about subjects not included in the prerogative clause

Like its refusal to bargain at all on the subjects covered by the prerogative clause, respondent's insistence that it would execute a contract only on condition that it include the clause stemmed from respondent's conception that unilateral control of the subjects in issue was "management's prerogative." The validity of its "prerogative" concept was the only justification which respondent advanced for demanding the Union's concurrence therein. When respondent chose to make its "prerogatives" "invulnerable to attack" (R. II, 32), by refusing to execute any contract unless the Union accepted the prerogative clause it staked the legality of its entire response to the Union's bargaining request upon the soundness of its "prerogative" theory. For respondent thereby made it clear that it would perform its statutory duty to bargain about such terms and conditions of employment as were not affected by the prerogative clause, only if the Union would agree that it had no obligation to bargain about those subjects which were covered by the clause. Thus, respondent of

fered only conditionally to bargain about subjects which admittedly fell within the bargaining requirement. Clearly, if the condition upon which it insisted was improper, respondent's offer failed to satisfy the statutory requirement. Rejection of respondent's prerogative theory reveals that the condition respondent demanded was not recognition of its legal rights but rather, condonation of its illegal conduct and the sacrifice of bargaining rights which the statute confers upon the Union. Under these circumstances, the impropriety of the condition seems beyond dispute; respondent's insistence upon it as the prerequisite for bargaining on subjects not covered by the clause, far from eliminating, or even obscuring the illegality of respondent's initial refusal to bargain about subjects which were covered, compounds its offense.

1. *By imposing a condition precedent to the execution of any contract respondent qualified its entire offer to bargain*

The terms of the Act make it plain that the duty to bargain comprehends the obligation to execute "a written contract incorporating any agreement reached if requested by either party," no less than the obligation "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment" (Section 8 (d)). Indeed, it was settled even before the Act was amended to include the

above quoted provision, that the execution of contracts was the goal of the statutory scheme, that the written agreement was the "final step in the bargaining process," [15] and that the duty to bargain therefore included the obligation to execute a written contract, once agreement as to substantive terms and conditions of employment was reached, because without such a permanent memorial the fruits of the bargaining itself would be lost.[16]

Since the duty to bargain includes the obligation to execute a contract covering the substantive terms and conditions agreed upon, it has uniformly been held that an employer who refuses to execute such a contract, except upon a condition on which he has no legal right to insist, thereby violates the Act. *National Labor Relations Board* v. *Dalton Telephone Co.*, 187 F. 2d 811 (C. A. 5), certiorari denied October 8, 1951, No. 145, this Term (employer's refusal to sign a contract unless the union registered under state law); *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. 2d 678, 680-681 (C. A. 6) (employer's refusal to sign a contract until the union chartered a local organization); *National Labor Relations Board* v. *Todd Co., Inc.*, 173 F. 2d 705, 707 (C. A. 2), (employer's refusal to enter into any contract unless

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[15] *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 525.

[16] *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 523-526; *Art Metals Construction Co.* v. *National Labor Relations Board*, 110 F. 2d 148, 150 (C. A. 2); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. 2d 632, 637-639 (C. A. 4).

union consented not to put agreement in writing); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 750-751 (C. A. 7) (employer's refusal to sign contract unless union accepted clause limiting recognition to members only). And it is immaterial whether such refusal occurs before or after the substantive terms are agreed upon, for if it occurs after agreement, the refusal blocks consummation of the statute's ultimate objective, and if it occurs before, it frustrates the entire bargaining process by making agreement on substantive terms futile and vain. *Art Metals Construction Co.* v. *National Labor Relations Board*, 110 F. 2d 148, 150 (C. A. 2); *Hartsell Mills Co.* v. *National Labor Relations Board*, 111 F. 2d 291, 292 (C. A. 4); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. 2d 632, 639 (C. A. 4); *National Labor Relations Board* v. *Barrett Co.*, 135 F. 2d 959, 961 (C. A. 7); *National Labor Relations Board* v. *Blanton Co.*, 121 F. 2d 564, 569-570 (C. A. 8); *National Labor Relations Board* v. *Montgomery Ward & Co.*, 133 F. 2d 676, 686 (C. A. 9); *National Labor Relations Board* v. *Register Publishing Co.*, 141 F. 2d 156, 160 (C. A. 9).

Thus, respondent was no more entitled to insist that the Union accept the prerogative clause as a condition to obtaining a contract than it would have been entitled to insist that the Union accept it as a condition to continuing negotiations. In the one case as in the other, unless the Union acquiesced in the condition, respondent would not

perform its statutory obligation. Hence, unless respondent was entitled to qualify its offer of performance by a condition of its own creation, its insistence upon the Union's acceptance of the clause clearly violated the Act.

2. *By demanding an extra-statutory concession as a condition precedent to bargaining respondent repudiated its obligation to bargain*

Congress fixed, in the Act itself, the conditions which, when fulfilled, bring the bargaining obligation into play. It did not authorize the parties upon whom it imposed that obligation to limit or evade it by superimposing on the statutory conditions additional conditions of their own.

Section 8 (a) (5) declares that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)." Section 9 (a) provides that the representative selected by a majority of the employees in the unit involved "shall be the exclusive representative of all the employees" for the purpose of collective bargaining concerning the enumerated matters which constitute the subjects to which the bargaining obligation applies (see pp. 22-23, *supra*). Thus, to bring an employer's bargaining obligation into play a majority of the employees must select a bargaining agent. In addition, since there can be no "refusal" without a request, the agent so selected must request the employer to

bargain collectively with it. *National Labor Relations Board* v. *Columbia Enameling & Stamping Co.*, 306 U. S. 292, 297, 298. Subject to the single qualification that an employer who, in good faith, entertains a genuine doubt that the agent has actually been selected by a majority of the employees in an appropriate unit may properly request proof of its representative status and refuse to bargain until such proof has been submitted,[17] once these conditions have been fulfilled the bargaining obligation becomes absolute, and the employer may not lawfully refuse to perform any of the acts specified in Section 8 (d) as constituting collective bargaining.[18]

A contrary view, which would permit the employer to escape performance of his statutory duty

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[17] It has become a well-settled rule that "an employer need not bargain with a union if he entertains a genuine doubt that it represents a majority in an appropriate bargaining unit" (*The L. Hardy Company*, 44 NLRB 1013, 1024); that, if the employer acts in good faith, he may properly "request [majority] proof before continuing with the negotiations" (*Allied Yarns Corporation*, 26 NLRB 1440, 1451), or even insist upon a Board election before granting recognition to the union. *Sport Specialty Shoemakers, Inc.*, 77 NLRB 1011, 1012-1013; *Joy Silk Mills, Inc.*, 85 NLRB 1263, 1264, enforced as modified, 185 F. 2d 732 (C. A. D. C.), certiorari denied, 341 U. S. 914; National Labor Relations Board, *Thirteenth Annual Report* (Gov't. Print. Off., 1949), p. 60; *Fourteenth Annual Report* (Gov't. Print. Off., 1950), p. 71; *Fifteenth Annual Report* (Gov't. Print. Off., 1951), p. 119.

[18] It has been held that non-compliance with the requirements contained in Sections 9 (f), (g), and (h), dealing with the filing of non-Communist affidavits and financial reports, does not affect the employer's obligation to bargain, but goes to the power of the Board to remedy violations of the obligation. *West Texas Utilities Co.* v. *National Labor Relations Board*, 184 F. 2d 233 (C. A. D. C.), certiorari denied, 341 U. S. 939, rehearing denied, October 8, 1951.

unless the Union complied with extra-statutory requirements imposed by the employer himself, would substantially dissipate the bargaining obligation. If the employer could qualify his duty at will, and the employees' right were made dependent not upon their compliance with the uniform and objective criteria fixed by the statute, but upon their willingness to bow to the employer's whim, then truly the guarantee in Section 7 of the right to bargain collectively would be "only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." Mr. Justice Jackson, concurring in *Edwards* v. *California*, 314 U. S. 160, 186. Such a view would leave the nature and number of conditions which the employer could lawfully exact entirely at large. As long as he acted in good faith, the employer could demand endless sacrifices, and yet escape condemnation of his frustration of the bargaining process as a violation of the Act. Such a result would hardly be compatible with the congressional objective of "encouraging the practice and procedure of collective bargaining" (Act, Section 1).

For these reasons, with the single exception of the decision of the court below in the instant case, the Board and every court which has considered the problem have held that an employer may not lawfully demand, as a condition precedent to performance of his own statutory duty, that the union perform an act which the statute does not require, or yield a right which the statute bestows. "Sec-

tion 7 of the Act guarantees to the employees the right to bargain collectively through a representative of their own choosing and it is not for the employer to restrain or interfere with the exercise of that right by insisting upon unwarranted conditions" (*National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 38 (C. A. 3)).[19]

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[19] Applying this principle the courts have held that an employer may not condition his willingness to bargain or sign a contract on the union's success in organizing employees of his competitors (*Pilling* case, *supra*); the union's disclosure of the names of its members (*National Labor Relations Board* v. *Cape County Milling Company*, 140 F. 2d 543, 545 (C. A. 8); *National Labor Relations Board* v. *Morris P. Kirk & Son, Inc.*, 151 F. 2d 490, 492 (C. A. 9)); the establishment of a local union (*National Labor Relations Board* v. *Aldora Mills*, 180 F. 2d 580 (C. A. 5), enforcing 79 NLRB 1, 2; *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. 2d 678, 680-681 (C. A. 6), certiorari denied, 308 U. S. 568); or the union's consent to an election when the employer's own unfair labor practices have intervened since the union's original showing of majority (*National Labor Relations Board* v. *Burke Machine Tool Company*, 133 F. 2d 618, 620 (C. A. 6)). In *Hartsell Mills Co.* v. *National Labor Relations Board*, 111 F. 2d 291 (C. A. 4), where the employer made withdrawal of unfair labor practice charges which the union had filed with the Board "a condition precedent to further negotiations," and thereby trenched upon the union's right to file and prosecute unfair labor practice charges, the Board, holding that the employer had violated both Sections 8 (5) and 8 (1) of the Act, said (18 NLRB 268, 280):

> The Act establishes a duty on the part of an employer to bargain with the representative of a majority of its employees concerning wages, hours, and other conditions of employment. The Act does not at the same time permit the employer to hedge about this duty by imposing unreasonable conditions precedent to bargaining collectively. A condition of the type here imposed, combining a restraint on the right to bargain collectively with an inducement to the labor organization to forego its redress for the employer's wrongful conduct . . . is particularly repugnant of the spirit of the Act.

Eppinger & Russell, 56 NLRB 1259, is precisely in point. In that case the employer refused to bargain with a union agent who had been properly designated by a majority of the employees unless and until the agent complied with the provisions of a Florida law which required union agents to obtain a state license before they could "operate" in the state. Rejecting the employer's contention that the existence of the state law warranted his action in conditioning bargaining upon the agent's procurement of a license, the Board held that the employer had thereby violated Section 8 (5) of the National Act. In *Hill* v. *Florida*, 325 U. S. 538, 542, this Court observed that the employer's insistence in *Eppinger & Russell* that the agent obtain a license as a condition precedent to bargaining "interfere[d] with the collective bargaining process" and that "The Board properly rejected the employer's contention * * *."

In the *Hill* case, this Court held that although the states were not in specific terms subjected to the prohibitions imposed upon employers by the federal Act, they are not empowered to impose conditions upon the exercise of employee rights which the federal Act guarantees, for such conditions bring about "a situation inconsistent with the federally protected process of collective bargaining"

Upholding the Board's finding the Court of Appeals commented (111 F. 2d, at p. 292): "it is clear that [the employer] could not thus make its compliance with the act dependent upon dismissal of charges that it had been guilty of violating it."

(325 U. S., at 543), and cause "a forfeiture of collective bargaining rights" (*id.*, at p. 539). *A fortiori*, private employers, to whom the statutory prohibitions directly apply, may not impose such conditions. If "Congress did not intend to subject the 'full freedom' of employees to the eroding process of 'varied and perhaps conflicting provisions of state enactments'" (*id.*, at p. 542), it could certainly not have intended to subject that freedom to the even more deadly erosion of conditions exacted by individual employers.

The principle is precisely the same when the condition or qualification imposed either by the state or by the employer affects the right to bargain about a particular term or condition of employment as when it affects any other right guaranteed by the national Act. Thus, in *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 398-399, this Court held that Wisconsin could not by law declare that "the matter of assigning workers to certain shifts 'infringe[s] upon the right of the employer to manage his business,'" and thereby relieve the employer of the obligation imposed by the national Act to bargain about that matter. If, as this Court held, Wisconsin's attempt to reserve the matter of shift schedules to unilateral employer determination brought it into "direct conflict" with the national Act, an employer's attempt to accomplish the same result by making it a condition precedent to the

performance of his own statutory duty is also in "direct conflict" with the national Act.

There is thus no room for the distinction, which was evidently drawn by the court below, between the condition insisted upon by the employer in the *Dalton Telephone* case, 187 F. 2d 811, 812-813 (C. A. 5), certiorari denied October 8, 1951, No. 145, this Term, and the condition insisted upon by respondent in this case. In the *Dalton* case, the court below held that the employer had violated Section 8 (a) (5) of the Act "by imposing as a condition precedent to the execution of a contract, which had already been agreed upon in substance, the requirement that the union register under a Georgia statute so as to make it an entity amenable to suit in the state courts" (*id.*, at p. 812). The court said that the Company "by insisting that the union become an entity amenable to suit in the state courts, left the sphere of 'terms and conditions of employment', and conditioned his willingness to sign the agreement on a matter outside the area of compulsory bargaining" (*id.*, at p. 812). Apparently, the court below distinguished the instant case on the ground that the condition upon which respondent insisted was within "the sphere of 'terms and conditions of employment' " and was therefore a matter within "the area of compulsory bargaining." But such a distinction overlooks the fact that the right of a labor organization to bargain about particular terms and conditions of employment is not itself a "term or condition of em-

ployment," but a benefit conferred by law, and that for this reason that matter is also "outside the area of compulsory bargaining."

Where, as in this case, the employer fragmentizes the Union's bargaining rights, and conditions his willingness to recognize one portion of those rights on the Union's surrender of the remainder, the employer's interference with the exercise of bargaining rights conferred upon the Union is doubly clear, and his violation of Sections 8 (a) (1) and (5) is doubly offensive. It is the equivalent of demanding, as a condition of bargaining, that the Union waive its statutory right to recognition as the exclusive representative of all the employees in the appropriate unit, and agree instead to accept recognition as exclusive representative of its members only (*McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748 (C. A. 7), certiorari denied, 313 U. S. 565),[20] or of demanding, as a condition to bargaining about other terms and conditions of employment, that the Union forego its right to bargain for a closed shop or check off of union dues (*i. e.*, under the original Act which permitted the closed shop). *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F.

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[20] See also, *National Labor Relations Board* v. *Corsicana Cotton Mills*, 178 F. 2d 344, 346-347 (C. A. 5); *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 114 F. 2d 849, 853 (C. A. 7), certiorari denied, 312 U. S. 680; *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F. 2d 713, 719 (C. A. 3); cf. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350-358.

2d 874, 883 (C. A. 1), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *Winona Textile Mills, Inc.*, 160 F. 2d 201, 208-209 (C. A. 8).[21]

Such interference with rights guaranteed employees by the Act cannot be justified on the theory, which was apparently adopted by the court below (R. I. 114), that the employer has a right to insist that the union "bargain" about the exercise of those rights. Recognition of the union's right to bargain about every subject within the area of "terms and conditions of employment," like recognition of its right to act as bargaining agent for all employees in the unit, "is not a bargaining matter" (*McQuay-Norris* case, *supra*, 116 F. 2d, at p. 751), but an obligation imposed upon the employer by law. Consequently, the employer cannot make his willingness to extend such recognition "the subject of a long and extended bargaining process"; and an employer who does so is "in default of [his] statutory obligation" (*ibid.*). A contrary view, as the court observed in the *McQuay-Norris* case, *ibid.*, "would confer upon the employer the

[21] The *Reed & Prince* case, *supra*, is particularly pertinent in that there, as here, the employer's condition was that any contract ultimately executed must contain a clause providing for the union's surrender of the particular bargaining right in dispute (118 F. 2d, at p. 883). In the *Winona* case, *supra*, the court held that the employer's position, in which he "flatly refused to bargain on any major point until the closed shop demand was dropped," placed the union "at a great disadvantage at the conference table" and was untenable, because the employer "had a duty to bargain in good faith on the issue of a closed shop as well as on other issues." 160 F. 2d, at p. 208.

option of bargaining concerning a matter guaranteed the employees as of right * * *."

Moreover, respondent was not "bargaining," in any sense, for a waiver of the union's right to negotiate and to participate in determining shift schedules and the other matters covered by the prerogative clause. What respondent offered the Union in exchange for surrender of its right to bargain about those matters was nothing more than performance of respondent's own statutory duty to bargain about other matters—something which, under no circumstances, did it have any right to withhold. Respondent left the Union with Hobson's choice—to take less than a full measure of the rights which Congress gave it, or no rights at all. To describe the employer's "steadfastness" in this position as "bargaining" (R. I. 114), is to confuse extortion with trade.

Certainly, respondent's additional demand that the Union acknowledge respondent's repudiation of its right to bargain about shift schedules and other matters by agreeing to incorporate the "prerogative" clause as a part of any collective bargaining contract did not transform respondent's illegal insistence upon the Union's surrender of that right into a lawful "bargaining" position. Cf. *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 883 (C. A. 1), certiorari denied, 313 U.S. 595, discussed in note 21, *supra*. Indeed, respondent's formulation of its position in contractual terms merely emphasized its insist-

ence upon treating "a matter guaranteed the employee as of right" as, at best, "a bargaining matter," *McQuay-Norris* case, *supra.*

Since respondent was not entitled initially to take the position that it would not bargain about shift schedules and other matters covered by the prerogative clause, or to buttress that position by refusing to bargain about all other matters unless the Union acknowledged its misconceived "prerogatives," respondent's position, as we shall now show, is not aided by the provision in Section 8 (d) of the Act that performance of the collective bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession." For the same reason, as we demonstrate below, pp. 51-57, *infra,* the fact that the Union could lawfully waive its right to bargain about shift schedules, or other matters within the statutory collective bargaining sphere, provides no exculpation for the illegal means used by respondent to exact the waiver.

B. *Section 8 (d) does not relieve employers of the obligation to honor bargaining rights conferred upon labor organizations by the Act*

The distinction, overlooked by the court below, between substantive terms and conditions of employment, which are left to be determined through the collective bargaining process by the parties, and the right and duty to engage in collective bargaining about those terms and conditions of em-

ployment, which are fixed by the statute, was firmly established long before Congress, in amending the Act, added the definition of "collective bargaining" contained in Section 8 (d). For example, in *Art Metals Construction Co.* v. *National Labor Relations Board,* 110 F. 2d 148 (C. A. 2), the court repudiated the employer's contention that because the Act left him free to disagree with the representative of his employees as to what wages and hours should be, it likewise left him free to refuse to perform his statutory obligation to reduce any agreement reached to writing. Speaking through Judge Learned Hand, the court said, 110 F. 2d, at p. 150:

> The freedom reserved to the employer is freedom to refuse concessions in working conditions to his employees, and to exact concessions from them; it is not the freedom, once they have in fact agreed upon these conditions, to compromise the value of the whole proceeding, and probably make it nugatory.

Accord: *National Labor Relations Board* v. *Highland Park Mfg. Co.,* 110 F. 2d 632, 639 (C. A. 4). Manifestly, this Court's statement in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 45, that the "Act does not compel agreements between employers and employees. * * * The theory of the Act is that free opportunity for negotiation * * * may bring about the adjustments and agreements," had reference only to "adjustments and agreements which the Act

in itself does not attempt to compel," not to the adjustment which Congress itself made in imposing upon employers the duty to recognize and bargain collectively with representatives selected by their employees.

Congress incorporated that distinction in Section 8 (d). The section restates the obligations comprehended by the duty to bargain collectively as including, *inter alia*, the obligation to negotiate "in good faith with respect to wages, hours, and other terms and conditions of employment" and to execute "a written contract incorporating any agreement reached if requested by either party." Clearly, the proviso's assurance that neither party is compelled "to agree to a proposal" or to make "a concession," was not intended to nullify the entire bargaining obligation by leaving compliance with the requirements of the Act optional with either party. It cannot be that Congress in one breath imposed the duty to bargain upon request about "wages, hours, and other terms and conditions of employment" and in the next breath provided that denial of the request should eliminate the duty.

As the Board observed (R. I. 87), the proviso, like the restatement to which it is attached, "substantially codifies the bargaining standards developed under the Wagner Act."[22] The proviso is

[22] See also, National Labor Relations Board, *Thirteenth Annual Report* (Gov't. Print. Off., 1949), p. 59; *Fifteenth Annual Report* (Gov't. Print. Off., 1951), p. 125.

directed to the concept of bargaining "in good faith," and emphasizes that while that obligation requires that parties "enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor" (*Globe Cotton Mills* v. *National Labor Relations Board*, 103 F. 2d 91, 94 (C. A. 5)), and continue such discussion until an agreement or impasse on these matters is reached, it does not require that the parties make substantive concessions on the economic questions which are the subjects of their negotiations. *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 225; *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. 2d 134, 139-140 (C. A. 4), certiorari denied, 302 U. S. 731; *National Labor Relations Board* v. *Andrew Jergens Co.*, 175 F. 2d 130 (C.A. 9), certiorari denied, 338 U. S. 827; *Singer Mfg. Co.* v. *National Labor Relations Board*, 119 F. 2d 131, 137 (C. A. 7), certiorari denied, 313 U. S. 595.

The legislative history of Section 8(d) shows that incorporation of the proviso in the amended Act was impelled by dissatisfaction with what Congress believed was the Board's practice in some cases of regarding an employer's failure or refusal to make economic concessions in the course of negotiations as an indication of bad faith. The report on the House bill (H. R. 3020, as reported 80th

Cong., 1st Sess., pp. 6-10, in 1 Leg. Hist. 36-40),[23] supported the inclusion therein of an objective definition of collective bargaining on the ground that in "determining whether or not employers had bargained in good faith," the Board had set "itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make" (H. Rep. No. 245, pp. 19-20 in 1 Leg. Hist. 310-311). The Report states (*id.*, at p. 20, in 1 Leg. Hist. 311) that "*in view of the Board's rulings on the duty to bargain the committee has deemed it wise to define collective bargaining to mean what the Supreme Court in the Jones & Laughlin case, supra, says it means.*" (italics in original). The Conference Report noted that "the Senate Amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession and thus prevented the Board from determining the merits of the positions of the parties." (H. Conf. Rep. No. 510, p. 34 in 1 Leg. Hist. 538). The Report concluded that the "conference agreement, like the Senate amendment, does not contain a definition as such of 'collective bargaining,' but does, in section 8 (d) of the

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[23] H. Rep. No. 245, 80th Cong., 1st Sess., in 1 Leg. Hist. 292. "Leg. Hist." refers to the two volume edition entitled Legislative History of the Labor Management Relations Act, 1947 (Gov't. Print. Off., 1948).

amended Labor Act, contain provisions similar to those of the Senate amendment . . ." (*id.*, at p. 35, in 1 Leg. Hist. 539).

Since the right to refuse to agree to a proposal or to make a concession relates only to substantive issues involving terms and conditions of employment, and is pertinent only to the question whether a party who has engaged in negotiations looking to the resolution of such issues by mutual agreement has bargained "in good faith," the proviso is manifestly irrelevant to a case such as this where the employer refused totally to negotiate concerning the establishment of certain substantive terms and conditions of employment by mutual agreement, and offered only conditionally to bargain about others, and where his repudiation of the bargaining obligation was found by the Board "*per se*" to violate the Act, without regard to any question of "good faith."

C. *That a party may lawfully waive collective bargaining rights conferred by the Act does not excuse the commission of unfair labor practices designed to induce such a waiver*

It goes almost without saying that the mere fact that the "prerogative" clause upon which respondent insisted could have been incorporated in the collective bargaining contract by lawful means provides no exculpation for respondent's use of unfair labor practices to induce its acceptance by the Union. The Board and the courts have recognized

that a duly designated bargaining agent does not lack capacity to waive various rights conferred by the Act,[24] and, where such a waiver has not resulted from the commission of unfair labor practices, the waiver has been upheld. The right to bargain about one or more subjects in the area of "terms and conditions of employment" is one of the rights within the capacity of a union to waive; the waiver may take the form of a temporary cession to the employer of power to deal unilaterally with the subjects in issue, or an agreement reserving such power to the employer for a definite time. "Collective bargains need not and do not always settle or embrace every exception. It may be agreed [between the bargaining parties] that particular situations are reserved for individual contracting, either completely or within prescribed limits."

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[24] See, *e.g.*, *Bethlehem Steel Company, Shipbuilding Division, et al.*, 89 NLRB 341, 345-346, enforcement denied on other grounds, 191 F. 2d 340 (C.A. D.C.) (union's right under Section 9 (a) to attend the adjustment of grievances by foremen); *May Department Stores Co.*, 59 NLRB 976, 981, n. 17, enforced, 154 F. 2d 533, 536 (C. A. 8), certiorari denied, 329 U. S. 725 (right to solicit memberships); *Briggs Indiana Corp.*, 63 NLRB 1270, 1272-1273 (right to represent certain units of employees); *General Controls Co.*, 88 NLRB 1341, 1342 (right to bargain about individual merit wage increases); *Globe Automatic Sprinkler Co.*, 95 NLRB, No. 42 (union's right to select negotiators who are not employees of the employer). Cf. *Alabama Marble Co.*, 83 NLRB 1047, 1049 (union's right to bargain with respect to certain hours and wages); *Old Line Life Insurance Co.*, 96 NLRB No. 66, decided September 27, 1951, 28 LRRM 1539, 1541 (union's right to bargain with respect to promotions). The Board not only requires that the waiver be entirely voluntary, but that there be a "clear and unmistakable showing of a waiver of such rights" *Tide Water Associated Oil Co.*, 85 NLRB 1096, 1098; The Board's Fifteenth Annual Report (Gov't. Print. Off. 1951), p. 121.

Order of Railroad Telegraphers v. *Railway Express Agency, Inc.*, 321 U. S. 342, 347.

But unless a premium is to be placed upon the commission of unfair labor practices, a "waiver" which results from an employer's refusal to recognize the Union's right to bargain about the issues in dispute, or his refusal to bargain on other issues in the absence of a waiver, cannot be deemed either voluntary or valid. In point here is *Richfield Oil Corp.* v. *National Labor Relations Board*, 143 F. 2d 860 (C. A. 9). There the court held that merchant sailors were entitled to have the assistance of their union "shore delegates" in settling grievances with the employer, and that the delegates' access to ships in port was a "necessary incident of the sailors' right of collective bargaining." During a period while negotiations for a new contract were under way the employer had refused to issue the customary ship passes to the delegates and defended his action "on the ground that [the sailors' right to have the delegates aboard] is one which they may bargain away and therefore one which the employer may withhold from the sailors during the period of their collective bargaining for a new contract . . ." Rejecting this defense, the court said "Assuming, but not deciding, that the sailors may bargain away the right of access of their shore delegates, in the absence of such an agreement the right exists and is enforcible. The owner cannot deny its exercise for the purpose of making a better bargain as to some other provision

of the contract" (143 F. 2d, at pp. 861-862). In many of the cases discussed in subsection "A" above, pp. 34-35, 38-45, *supra,* the waiver upon which the employer insisted was one which the Union was empowered to grant. In this sense, the waiver was something "about which the parties may bargain or negotiate, but which cannot be insisted upon as a condition precedent to the making of a contract." *National Labor Relations Board* v. *Dalton Telephone Co.,* 187 F. 2d 811, 812 (C. A. 5), certiorari denied, October 8, 1951, No. 445, this Term.

Thus, an employer can no more lawfully refuse to submit any issue in the area of terms and conditions of employment to the bargaining process in order to secure a waiver of the Union's right to bargain about that subject than he can lawfully bargain with individuals or take unilateral action concerning it, or refuse to bargain altogether to achieve the same end. *Order of Railroad Telegraphers* case, *supra; National Labor Relations Board* v. *J. H. Allison & Co.,* 165 F. 2d 766, 768 (C. A. 6), certiorari denied, 335 U. S. 814; *National Labor Relations Board* v. *Todd Co., Inc.,* 173 F. 2d 705, 707 (C. A. 2); *Hughes Tool Co.* v. *National Labor Relations Board,* 147 F. 2d 69, 73 (C. A. 5); *National Labor Relations Board* v. *Corsicana Cotton Mills,* 178 F. 2d 344, 347 (C. A. 5). The same reasons which prevent an employer from relying upon conditions which could otherwise redound to his advantage, where the conditions have resulted

from his commission of unfair labor practices—*e.g.*, a union's loss of majority status (*Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702; or a strike which affords opportunity to secure permanent replacements (*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333)—prevent according validity to a waiver induced by such unfair labor practices.

It follows, that while an employer may lawfully in the course of negotiations propose that the union waive a portion of its bargaining rights,[25] and offer economic concessions which he is free under the Act to withhold as an inducement to obtain the Union's assent, he may not lawfully even compel discussion, much less compel assent to such a proposal, either by refusing to recognize the Union's right to bargain about the issues in dispute, or by conditioning the continuation of negotiations or the execution of a contract upon it.[26] In other words, it is the

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[25] See, *e.g.*, *Alabama Marble Co.*, 83 NLRB 1047, 1049-1050 (hours and wages); *Old Line Life Insurance Co.*, 96 NLRB, No. 66, 28 LRRM 1539, 1541 (promotions); *Standard Generator Service Company of Missouri, Inc.*, 90 NLRB 790, 791 (revision of wage rates).

[26] Cox and Dunlop, *op. cit. supra*, note 7, notwithstanding the Board's holdings which sustain the validity of voluntary waivers of the right to bargain about various terms and conditions of employment, suggest that to preserve the possibility of such agreements the Board should construe the Act as requiring only that the employer negotiate in good faith on major issues of wages and hours, thereby leaving the employer free—as a matter of law—to refuse to bargain about such terms and conditions of employment as pensions, shift schedules, etc. Apart from the fact that the terms of Section 9 (a) and 8 (d) leave no room for such splitting of the content of the bargaining obligation, the approach which these authors suggest would abandon to economic warfare issues which Congress removed from that area by substituting the

Union which has the option of bargaining about waiver of its right to a voice in the determination of matters within the compulsory bargaining sphere, just as it is the employer who has the option of bargaining about waiver of his right unilaterally to determine matters outside that sphere.[27] Therefore, when a union rejects the employer's suggestion or inducement to waive bargaining on a particular subject to which the bargaining obligation applies, the employer must bargain. Otherwise he is in the same position as if he had refused to bargain about the subject

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rule of law. The fact that the construction of the Act adopted by the Board and the courts leaves ample room for the result which the authors deem so desirable demonstrates that no such distortion of the Act as they suggest is necessary to accomplish it. See Findling and Colby, *op. cit. supra*, n. 7.

[27] Thus, although a union may not require an employer to bargain concerning the conditions under which replacements for economic strikers are to be hired (*Times Publishing Company*, 72 NLRB 676, 684), or concerning the reinstatement of employees on strike in violation of a no-strike clause in the union's contract (*Charles E. Reed & Co.*, 76 NLRB 548, 549-550; National Labor Relations Board *Thirteenth Annual Report* (Gov't. Print. Off., 1949), p. 61), the employer may agree to bargain about matters such as these. The Committee Report on the House bill (H. Rep. No. 245, on H. R. 3020, 80th Cong., 1st Sess., pp. 22-23, in 1 Leg. Hist. 292, 313-314), in discussing the "scope of bargaining," recognized the limitations upon the subject matter of compulsory bargaining: "Just as the employer has no right to bargain about who the union's officers and representatives will be, what dues and assessments it shall impose, how it shall spend its money or otherwise conduct its internal affairs so long as they do not affect the employer's operations, so the union has no right to bargain with the employer about who his agents will be, what prices he will charge, what his profits shall be, or how he shall manage his business, so long as he does not violate the union's contract with him or ignore his obligations under the Labor Act."

in question at the outset of negotiations, without suggesting a waiver by the Union.[28]

Effectuation of the policies of the Act requires this result. The theory of the Act is that industrial peace will be promoted if all the issues to which the bargaining obligation applies are resolved by mutual agreement between the employer and the bargaining agent of the employees. On this theory, an employer's refusal to submit such issues to the bargaining process is clearly productive of dissatisfaction and strife. *Order of Railroad Telegraphers,* case, *supra.* The objectives of the Act are satisfied only where the issues are resolved by mutual agreement or are left to individual bargaining by voluntary agreement of the parties.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed, insofar as it holds that respondent did not violate Section 8 (a) (5) and (1) of the

[28] The Board's holding in *Shell Oil Company,* 77 NLRB 1306, that an employer who had reached agreement with the union on all substantive terms of a contract did not unlawfully refuse to bargain by insisting on the inclusion of a no-strike clause therein is not inconsistent with the pattern of holdings described above. As the Board explained in *Bethlehem Steel Company, Shipbuilding Division, et al.,* 89 NLRB 341, 345, n. 9: "Since the statutory purpose to substitute the practice and procedure of collective bargaining for industrial strife was achieved by the parties' agreement on all the substantive terms and conditions of employment, it was by the same token consonant with this salutary objective for the companies to demand, as part of the bargain, that the union refrain from striking and respecting picket lines for the duration of the contract."

Act when it conditioned the execution of any contract with the Union upon the inclusion of the restrictive prerogative clause therein, and insofar as it denied enforcement of paragraph 1 (a) of the Board's order.

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JANUARY, 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 151, *et seq.*), are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the

representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

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